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Bailments--Allocation of the Burden of Proving the Bailee's Negligence--Broadview Leasing Co. v Cape Central Airways, Inc.

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RECENT CASES

BAILMENTS—ALLOCATION OF THE BURDEN OF PROVING THE BAILEE'S NEGLIGENCE

Broadview Leasing Co. v. Cape Central Airways, Inc.[1]

Plaintiffs owned two airplanes and aircraft equipment which defendant Cape Central stored and serviced at the Cape Girardeau airport in hangars leased from the City of Cape Girardeau.[2] Cape Central was also responsible for the management and operation of the airport under various agreements with the city. The Cape Girardeau area was struck by a violent thunderstorm during which a bolt of lightning ignited the roof of the wooden hangar housing plaintiffs' airplanes and equipment. After trying to control the fire with a garden hose, Cape Central's night watchman called the fire department. By the time the fire department reached the scene, the fire had consumed the hangar and both aircraft had exploded.

Plaintiffs brought an action against Cape Central in three counts, alleging breach of a bailment contract, specific negligence, and general negligence under *res ipsa loquitur*. Evidence was introduced at trial to show that two fires had previously occurred at the airport, that one of these fires was caused by lightning, and that a wooden hangar was destroyed in that fire. Testimony showed that the hangar housing plaintiffs' aircraft had not been equipped with sprinklers, usable hydrants, fire prevention materials, or lightning rods.

Cape Central denied the allegations of negligence and alleged that the loss was caused by an act of God. It introduced evidence of the acquisition of portable fire extinguishers and an old fire truck, and, over plaintiffs' objection, evidence of the fire protection practices of similar airports in the area. Plaintiffs moved for a directed verdict on the ground that defendant Cape Central failed to sustain its burden of proving that the loss was not due to its negligence. The trial court denied the motion, indicating that the burden of proving the bailee's negligence was on the bailor. The St. Louis District of the court of appeals affirmed the trial court's placement of the burden of proving the bailee's negligence, and in so doing clarified the law of bailments in Missouri. It

1. 539 S.W.2d 553 (Mo. App., D. St. L. 1976).

2. Broadview Leasing Co. and National Enterprises, Inc. each owned an airplane; Astro Rentals, Inc. owned the aircraft equipment. *Id.* at 555.

seems anomalous that the elements of an ancient legal relationship[3] should need clarification in the twentieth century; yet, allocation of the burden of proof in bailment actions has been a continuing source of confusion to courts in Missouri[4] and nationwide.[5] The purpose of this note is to study Missouri law relating to this problem.

Much of the confusion has been produced by the evolution of three different methods to apportion the burden of proof in bailment actions.[6] Most states place upon the bailor the burden of establishing the bailment, the failure to redeliver, and the bailee's failure to exercise the requisite degree of care.[7] A second group of states also require the bailor to establish the bailment and the failure to redeliver, but relieve the bailor of the burden of proving the bailee's negligence.[8] In those jurisdictions, the bailee has the burden of proving his exercise of due care as an affirmative defense.[9] A third group of states synthesizes the first two rules by allocating the burden of proof on the issue of negligence based on the cause of action selected by the bailor. When the bailor sues in tort, he is required to establish the bailee's negligence.[10] If

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3. *See* 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 336-50 (3d ed. 1927).

4. Broadview Leasing Co. v. Cape Central Airways, Inc., 539 S.W.2d 553, 560 (Mo. App., D. St. L. 1976) ("The whole question of which party bears the 'burden of proof' in a bailment situation has not been clearly articulated in this state."); Nuell v. Forty-North Corp., 358 S.W.2d 70, 76 (St. L. Mo. App. 1962) ("Some confusion appears to have arisen regarding which party carries the burden of proof when the bailor's action is bottomed on a breach of the contract of bailment, rather than on negligence."); Freeman v. Foreman, 141 Mo. App. 359, 363, 125 S.W. 524, 526 (Spr. Ct. App. 1910) ("There has been some confusion in early decisions in this state upon [the] question [who carries the burden of proof in a bailment situation] . . . .").

5. *See* 8 AM. JUR. 2d *Bailments* § 306 (1963); Annot., 44 A.L.R.3d 171 (1972).

6. R. BROWN, PERSONAL PROPERTY § 11.8 (3d ed. 1975). *See also*, Comment, *Burden of Proof of Bailee's Negligence in Connection with His Failure to Redeliver*, 8 HASTINGS L. REV. 89 (1956).

7. *See, e.g.*, Agricultural Ins. Co. v. Constantine, 144 Ohio St. 275, 58 N.E.2d 658 (1944); Wyatt v. Baughman, 121 Utah 98, 239 P.2d 193 (1951).

8. *See, e.g.*, Low v. Park Price Co., 95 Idaho 91, 503 P.2d 291 (1972); Knowles v. Gilchrist Co., 362 Mass. 642, 289 N.E.2d 879 (1972) (excellent discussion of history of the law); National Surety Corp. v. Todd County Dairy Coop., 269 Minn. 298, 130 N.W.2d 511 (1964); National Fire Ins. Co. v. Morgan, 186 Ore. 285, 206 P.2d 963 (1949); Kelly v. Capital Motors, 204 S.C. 304, 28 S.E.2d 836 (1944).

9. The bailee in such a case bears the entire burden of proof on the issue. Care must be exercised in reading the decisions, for the burden borne by the bailee is often framed in ambiguous terms. The phrase "burden of proof" is often used, where from the context of the opinion it is apparent that the burden of production of evidence is all that is intended.

10. *See, e.g.*, Broadview Leasing Co. v. Cape Central Airways, Inc., 539 S.W.2d 553 (Mo. App., D. St. L. 1976); Bohmont v. Moore, 138 Neb. 784, 295 N.W. 419 (1940); Boyles v. Campbell, 420 P.2d 875 (Okla. 1966); Canty v. Wyatt Storage Corp., 208 Va. 161, 156 S.E.2d 582 (1967). *See generally*, R. BROWN, *supra*

the bailor's action is in contract, however, the bailee has the burden of proving his exercise of due care as an affirmative defense.[11] *Broadview Leasing* places Missouri in this third group of states.[12]

The Missouri rule enunciated in *Broadview Leasing* requires the bailor suing in tort to prove the bailee's negligence. Courts have recognized that this rule creates a difficult task for a bailor attempting to prove specific negligent acts of the bailee.[13] To assist the bailor, courts have held that a "presumption"[14] of negligence arises once the bailor has offered evidence to prove the bailment and the failure of the bailee to redeliver upon a legal demand.[15] The effect of this presumption is to shift to the bailee the burden of production of evidence on the issue of due care and to make a submissible case for the bailor.[16] Missouri courts have recognized this doctrine of presumptions,[17] albeit not without a certain measure of ambiguity.[18] Such ambiguity is a frequent by-

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note 6, § 11.8; Annot., *supra* note 5; Brodkey, *Practical Aspects of Bailment Proof*, 45 MARQ. L. REV. 531 (1962).

11. *See* authorities cited note 10 *supra*.

12. 539 S.W.2d 553, 560-61. Missouri cases further distinguish between allegations of general negligence and specific negligence when the bailor's action is in tort. *See* notes 31-38 and accompanying text *infra*.

13. Low v. Park Price Co., 95 Idaho 91, 503 P.2d 291 (1972); Knowles v. Gilchrist Co., 362 Mass. 642, 289 N.E.2d 879 (1972); McKeever v. Kramer, 203 Mo. App. 269, 218 S.W. 403 (St. L. Ct. App. 1920); Freeman v. Foreman, 141 Mo. App. 359, 365, 125 S.W. 524, 526 (Spr. Ct. App. 1910) ("To require the plaintiff . . . to prove specific acts of negligence which caused the injury, or to prove in what particular the defendant failed to exercise ordinary care . . . would be to place upon him an impossible burden, and require him to assume the responsibility of proving facts that were exclusively within the knowledge of the defendants . . . and would be equivalent to denying him any relief at all.").

14. *See* note 18, *infra*, for a discussion of the terms "inference" and "presumption."

15. *See, e.g.*, Watson v. Byerly Aviation, Inc., 7 Ill. App. 3d 662, 288 N.E.2d 233 (1972); Aetna Life & Cas. Co. v. Star-Craft Corp., 499 P.2d 776 (Mont. 1972); Sumison v. Streator-Smith Inc., 103 Utah 44, 132 P.2d 680 (1943). *See generally* C. MCCORMICK, EVIDENCE § 343 (2d ed. 1972).

16. Nuell v. Forty-North Corp., 358 S.W.2d 70 (St. L. Mo. App. 1962); Oliver Cadillac Co. v. Rosenberg, 179 S.W.2d 476 (St. L. Mo. App. 1944).

17. Bommer v. Stedelin, 237 S.W.2d 225, 227 (St. L. Mo. App. 1951); Oliver Cadillac Co. v. Rosenberg, 179 S.W.2d 476, 480 (St. L. Mo. App. 1944); Freeman v. Foreman, 141 Mo. App. 359, 364-65, 125 S.W. 524, 526 (Spr. Ct. App. 1910); Casey v. Donovan, 65 Mo. App. 521, 527 (St. L. Ct. App. 1896). *See* note 50 *infra* suggesting that this presumption is no longer needed in Missouri.

18. The effect of the Missouri decisions is to raise only an *inference* of negligence where general allegations of negligence suggest a recovery under *res ipsa loquitur*. Because of the imprecision with which the terms "presumption" and "inference" have been used, however, one finds Missouri cases which hold that a prima facie *res ipsa* case raises a *presumption* of negligence. Weinberg v. Wayco Petroleum Co., 402 S.W.2d 597, 598 (St. L. Mo. App. 1966); Nuell v. Forty-North Corp., 358 S.W.2d 70, 76 (St. L. Mo. App. 1962); Bommer v. Stedelin, 237 S.W.2d 225, 227 (St. L. Mo. App. 1951). The terms "presumption" and

product of the operation of the bailor's presumption, which in practice confounds rather than simplifies his task.

The operation of presumptions is complicated by rules which require varying amounts of evidence to rebut the presumption. Although there are several alternative rules which may regulate this issue,[19] most jurisdictions follow the Thayer rule.[20] To rebut a presumption, the Thayer rule requires the party against whom the presumption operates to produce enough evidence in his favor to support a jury verdict on that issue. Missouri follows the Thayer approach,[21] although there is conflict in Missouri[22] and in other states[23] as to what type of evidence will satisfy the test. A minority rule requires only that the bailee show the cause of the loss or damage, *e.g.*, loss by fire, in order to rebut the

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"inference" are terms which have fundamentally different meanings, and yet are often confused by the courts in bailment cases. According to Wigmore,

> [a] presumption . . . is in its characteristic feature a rule of law laid down by the judge, and attaching to one evidentiary fact certain *procedural consequences* as to the duty of production of other evidence by the opponent. It is based, in policy, upon the probative strength, as a matter of reasoning and inference, of the evidentiary fact; but the presumption is not the fact itself, nor the inference itself, but the legal consequence attached to it.

9 J. WIGMORE, EVIDENCE § 2491 (3d ed. 1940) (emphasis in original). A presumption, then, is a procedural device which is used only by the court to allocate the burden of production of evidence. On the other hand, an inference is a permissible deduction drawn from the evidence and as such is only of primary concern to the trier of fact. *Id.* Because of the substantial differences in the operation of these principles, the need for their proper application in bailment cases becomes clearer. For example, in a jurisdiction where the bailor is required to prove the bailee's negligence, the bailor will automatically prevail on the issue of negligence if a presumption operated in his favor and the bailee failed to rebut it. But if the bailor's only advantage was an inference, then the jury under the same circumstances would theoretically be free to find for either party. The importance of the distinction is underscored where the bailed property has been destroyed and evidence of the bailee's negligence may be nearly impossible to obtain.

19. *See* Hinds v. John Hancock Mut. Life Ins. Co., 155 Me. 349, 155 A.2d 721 (1959) for a discussion of the alternatives, each of which varies in the amount of evidence required to overcome a presumption, and in whether the responsibility for determining if that has been done is on the court or jury.

20. C. MCCORMICK, *supra* note 15, § 345.

21. Terminal Warehouses of St. Joseph, Inc. v. Reiners, 371 S.W.2d 311 (Mo. 1963); "Presumptions may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts." Mackowick v. Kansas City, St. J. & C.B. Ry., 196 Mo. 550, 571, 94 S.W. 256, 262 (1906).

22. *Compare* Levi v. Missouri K. & T. Ry., 157 Mo. App. 536, 138 S.W. 699 (K.C. Ct. App. 1911) (bailee need only show loss by fire to exonerate) *with* Walters v. Adams Transfer & Storage Co., 235 Mo. App. 713, 141 S.W. 2d 205 (K.C. Ct. App. 1940) (evidence of loss by fire insufficient as matter of law to exonerate).

23. *See* R. BROWN, *supra* note 6, § 11.8; Brodkey, *supra* note 10; Annot., *supra* note 5.

presumption of negligence.[24] The majority rule requires that the bailee go further and produce some evidence as to his exercise of due care in order to rebut the presumption.[25] The policy objectives underlying the majority rule are basically the same as those which fathered the presumption of negligence.[26] Such objectives include placing the burden of proof on the party with access to the facts and placing the risk of financial loss on the party best able to bear that loss. Courts following the majority rule generally recognize the ease with which those objectives can be frustrated by application of the minority rule.[27] Although it has not always been the case,[28] Missouri now appears to follow the majority rule[29] and requires the bailee to produce evidence of the exercise of due care in order to rebut the presumption of his negligence.

Broadview Leasing mandates a different allocation of the burden of proof if a bailor sues on the contract. The bailor must establish the bailment and failure to redeliver. The bailee has the burden of proving the exercise of due care as an affirmative defense.[30] This rule can be viewed as placing a much heavier burden on the bailee in bailment actions on the contract. The bailee must carry not only the burden of production of evidence as in tort actions, but also must assume the burden of persuasion on the issue of negligence. The *Broadview Leasing* court rejected the application of this stricter rule to bailment actions based in tort, thereby

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24. Although the bailee is required by this rule to produce *some* evidence as to his own due care, this is only used to rebut the bailor's presumption. The bailee does *not* assume the burden of persuasion on the due care issue. *See* authorities cited in note 22 *supra*.

25. *Id.*

26. Knowles v. Gilchrist Co., 362 Mass. 642, 643-50, 289 N.E.2d 879, 880-84 (1972) (The court outlines the development of the law and the policy objectives sought to be furthered, discussing in particular the superiority of the bailee's knowledge of the circumstances of loss over the bailor's.).

27. "The imposition of such a minimal burden of production on the bailee defeats the rule's basic purpose because the bailee can simply note that a theft or a fire of unknown origin made delivery of the bailed goods impossible and rest his case." Knowles v. Gilchrist Co., 362 Mass. 642, 648, 289 N.E.2d 879, 883 (1972).

28. Levi v. Missouri K. & T. Ry., 157 Mo. App. 536, 138 S.W. 699 (K.C. Ct. App. 1911); E.O. Stanard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258, 26 S.W. 704 (1894).

29. Scholman v. Joplin Auto Auction Co., 439 S.W.2d 215 (Spr. Mo. App. 1969) (explanation of loss by theft insufficient); Walters v. Adams Transfer & Storage, 235 Mo. App. 713, 141 S.W.2d 205 (K.C. Ct. App. 1940) (explanation of loss by fire insufficient).

30. Broadview Leasing Co. v. Cape Central Airways, Inc., 539 S.W.2d 553, 561 (Mo. App., D. St. L. 1976); Crow Contracting Corp. v. George F. Smith Co., 407 S.W.2d 593, 597 (St. L. Mo. App. 1966); Nuell v. Forty-North Corp., 358 S.W.2d 70, 76 (St. L. Mo. App. 1962); Freeman v. Foreman, 141 Mo. App. 359, 125 S.W. 524 (Spr. Ct. App. 1910); E.O. Stanard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258, 275, 26 S.W. 704, 709 (1894) (dictum); Goodfellow's Executors v. Meegan, 32 Mo. 280 (1862).

reaffirming the distinction Missouri courts have drawn between tort and contract theories for the purpose of allocating the burden of proof in bailment actions.[31]

Although the tort-contract distinction is recognized in many American jurisdictions, its particular application in Missouri is unusual.[32] Missouri courts subdivide bailment actions based in tort into two sub-classifications: "specific" and "general" negligence.[33] The general negligence cases are actually based on a *res ipsa loquitur* theory; Missouri courts seem to use the terms interchangeably in bailment cases. If a bailor alleges specific negligence, he must carry both the burden of production of evidence and the burden of persuasion on the issue of negligence.[34] The bailor does not obtain the benefit of a presumption to satisfy these burdens of proof.[35] On the other hand, a bailor who pleads and proves a *res ipsa* case enjoys the benefit of an inference[36] of negligence and thereby makes a submissible case.[37] The line between specific negligence and *res ipsa* is not always easily drawn. Pleadings make out a negligence cause of action based on *res ipsa* if they do not state a particular negligent act or omission and do not name the individual responsible for the loss or injury. *Res ipsa* pleadings would not withstand a motion to

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31. However, it should be carefully noted that the effect of this rule is *not* to create a so-called "shifting burden," since in contract cases both the burden of production *and* persuasion remain on the same parties throughout the trial. Such a shifting burden may only be said to exist when a presumption operates during the course of trial to shift the burden of production to a party who does *not* have the burden of persuasion on that issue. J. WIGMORE, *supra* note 18, § 2491.

32. The Missouri cases are among the few cases encountered which clearly articulate the distinctions between actions in contract, specific negligence, and general negligence (*res ipsa loquitur*) as discussed in the textual matter *infra*. Some states which have confronted the issue use the same approach Missouri does. *See* Boyles v. Campbell, 420 P.2d 875, 878 (Okla. 1966); Newton Chevrolet Co. v. Canle, 31 Tenn. App. 67, 212 S.W.2d 392 (1948).

33. While speaking in terms of "general" negligence, the Missouri courts are evidently referring to a cause of action based on *res ipsa loquitur*. Broadway Leasing Co. v. Cape Central Airways, Inc., 539 S.W.2d 553 (Mo. App., D. St. L. 1976); Nuell v. Forty-North Corp., 358 S.W.2d 70 (St. L. Mo. App. 1962); Freeman v. Foreman, 141 Mo. App. 359, 125 S.W. 524 (Spr. Ct. App. 1910).

34. Nuell v. Forty-North Corp., 358 S.W.2d 70 (St. L. Mo. App. 1962); Bommer v. Stedelin, 237 S.W.2d 225, 228 (St. L. Mo. App. 1951); E. O. Stanard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258, 26 S.W. 704 (1894).

35. *See* cases cited note 33 *supra*, note 50 *infra*.

36. Some cases use the term "presumption" as discussed in note 17, *supra*. This usage is particularly misleading in *res ipsa* cases, for if correct it would require a mandatory finding of negligence on the bailee's part if he failed to meet the burden of producing evidence of due care. Such is not the law in *res ipsa* cases, however, since the trier of fact must always find negligence as an independent finding, in addition to the basic circumstances that gave rise to the inference. *See* MO. APPROVED INSTR. No. 31.02 (1969 ed.).

37. Nuell v. Forty-North Corp., 358 S.W.2d 70 (St. L. Mo. App. 1962); Bommer v. Stedelin, 237 S.W.2d 225 (St. L. Mo. App. 1951).

make more definite if the case were tried on a specific negligence theory.[38]

Different evidentiary burdens attach to the respective types of negligence because of a general belief by Missouri courts that negligence is a positive wrong, and therefore ought never to be presumed.[39] Such a rationale in bailment actions is contradicted by the existence of the presumptions discussed earlier. Further, the utility of the specific negligence—*res ipsa* distinction in bailment cases grounded in tort is limited by the bailor's option in Missouri to sue on the contract, forcing the bailee to carry the burden of proving his own due care by way of an affirmative defense.

The ability of a bailor to state a bailment claim in contract is recognized in Missouri,[40] although there only after years of confusion. One of the earliest cases to recognize the contractual remedy was *Goodfellow's Executors v. Meegan*.[41] The bailee sued for the price on a contract to keep the bailor's oxen. The defendant-bailor sought by way of counterclaim to recover the value of three oxen not returned by the bailee. Each party argued the other had the burden of proof on the issue of the bailee's negligence. The court stated that once the bailment and failure to return were alleged and proved, it was incumbent upon the bailee to prove the loss of the bailed goods was not due to his negligence. *Wiser v. Chesley*[42] followed this rule by holding that after a bailor established his prima facie case of delivery and non-return, "[t]he *onus* is then upon the [bailee] to exonerate himself from the liability . . . ."[43] However, subsequent decisions interpreted *Wiser* as a negligence action[44] and construed "exonerate" to require only an *explanation* of the loss which would comply with the minimal requirements of the "minority rule," *i.e.*, it was not necessary for the bailee to show his own due care.[45]

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38. *See, e.g.*, Bommer v. Stedelin, 237 S.W.2d 225 (St. L. Mo. App. 1951); Benner v. Terminal R.R., 156 S.W.2d 657 (Mo. 1941).

39. Witting v. St. Louis & S.F. Ry., 101 Mo. 631, 640, 14 S.W. 743, 745 (1890) ("[N]egligence is a positive wrong and will not be presumed, though it may be inferred from circumstances . . . . The party who founds his cause of action upon negligence must be prepared to establish the assertion by proof.").

40. Broadview Leasing Co. v. Cape Central Airways, Inc., 539 S.W.2d 553 (Mo. App., D. St. L. 1976); Nuell v. Forty-North Corp., 358 S.W.2d 70 (St. L. Mo. App. 1962).

41. 32 Mo. 280 (1862).

42. 53 Mo. 547 (1873).

43. *Id.* at 550.

44. *See* the discussion of early bailment principles in Freeman v. Foreman, 141 Mo. App. 359, 363-65, 125 S.W. 524, 526 (Spr. Ct. App. 1910).

45. *See* text accompanying note 23 *supra;* E.O. Stanard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258, 276, 26 S.W. 704, 709 (1894); Witting v. St. Louis & S.F. Ry., 101 Mo. 631, 639, 14 S.W. 743, 745 (1890); McKeever v. Kramer, 203 Mo. App. 269, 275, 218 S.W. 403, 405 (St. L. Ct. App. 1920); Crawford v. Cashman & Son, 82 Mo. App. 554, 558 (K.C. Ct. App. 1900).

After *Wiser* Missouri law governing bailment actions based in contract became confused. Contractual recoveries were not possible for some period of time because of the rules applied by the courts. For example, in *Cummings v. Mastin*[46] the court held that the bailor had the burden of proving the negligence of the bailee after the bailor had alleged breach of the bailment contract.[47] Similar results were reached in other cases where courts interpreted pleadings which stated a cause of action in contract as implicitly alleging negligence.[48] During this period, Missouri courts entertained a belief that bailors should use the negligence form of action.[49] *Broadview Leasing* and other recent cases have corrected this situation by firmly establishing the existence in Missouri law of separate bailment actions in tort and on the contract.[50]

By reaffirming the contract—tort distinction, *Broadview Leasing* clarified the law in Missouri at the expense of perpetuating a rule based on the subtleties of pleading and which has been the subject of substan-

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46. 43 Mo. App. 558, 560 (K.C. Ct. App. 1890).

47. *See also* McKeever v. Kramer, 203 Mo. App. 269, 218 S.W. 403 (St. L. Ct. App. 1920). There the court stated, "that plaintiff's petition is sufficient in form to base a recovery on the theory of gratuitous bailment in the absence of any allegation of negligence on the part of defendant, but this can only be done by virtue of the facts that the defendant filed a general denial, and did not confess the bailment . . . and account for the loss of the property . . . ." *Id.* at 275, 218 S.W. at 405. This ruling is consistent with *Cummings v. Mastin* in that it seems to require an allegation of negligence if the source of the loss can be determined. It thus denies the possibility of an action alleging only breach of contract, where the bailee is required to prove his own due care.

48. *See, e.g.*, Crawford v. Cashman & Son, 82 Mo. App. 554 (K.C. Ct. App. 1900). The court held "where the plaintiff has shown that the bailee received the property in good condition, and failed to return it, . . . he has made out a prima facie case of negligence . . . ." *Id.* at 558.

49. Oliver Cadillac Co. v. Rosenberg, 179 S.W.2d 476, 480 (St. L. Ct. App. 1944) ("[T]he gist of a cause of action of bailor against bailee is negligence, and the burden rests on the bailor to plead and prove negligence as the cause of the loss or injury, and this burden rests on the plaintiff to the end of the case."). *See also* Bock v. Eilen, 211 S.W.2d 92 (Spr. Mo. App. 1948); McKeever v. Kramer, 203 Mo. App. 269, 218 S.W. 403 (St. L. Ct. App. 1920).

50. The case authority discussed in the preceding two paragraphs is one of two lines of authority in Missouri law, one recognizing the contract action and one the tort action. As suggested above, courts tended for a while to recognize only authority which permitted bailment actions based in tort. Now, however, the contract action is again recognized. The practical result of this is that the bailor's presumption of negligence discussed earlier is now superfluous. Any action alleging only delivery, bailment, and non-return will now be interpreted as a contract action, and the bailee will bear the burden of proof on the due care issue. Years ago, this would have been the sort of action that the courts would have held to have given rise to the presumption of negligence. The presumption may not arise under other circumstances, either, since actions alleging general negligence give rise only to an inference and actions pleading specific negligence require the bailor to prove each act alleged. So while the doctrine of presumptions has not technically been overruled, a shift in judicial perceptions has made it obsolete.

tial criticism.[51] Missouri courts should reconsider the *Broadview Leasing* rule and instead place the burden of proving due care on the bailee regardless of the form of action selected by the bailor. In support of the *Broadview Leasing* rule is the acknowledged consistency in burden of proof allocation which it produces between general tort law and bailment actions based in tort by always placing the burden of proving negligence on the plaintiff. While this uniformity may be desirable as a general proposition, it exalts form over substance because, under Missouri law, the bailor always may place the burden of proof of negligence on the bailee by suing on the contract rather than in tort.

If consistency in the law is the goal, courts should apply the same burden of proof rules to all bailment cases regardless of the form of action selected. The fact that the bailee probably has superior knowledge concerning the facts surrounding the loss suggests that the burdens of proof could best be assumed by the bailee. Such a rule could be justified under an enterprise liability theory, because bailees are better able than bailors to purchase insurance for bailment losses and to reflect the premiums in increased service charges. This approach would harmonize bailment law by applying the same rules to common law bailments as are applied to bailments under the Uniform Commercial Code, which has adopted the scheme for warehouse bailments.[52] The use of a single rule also would reduce the impact of other variations between the remedies, such as differences between tort and contract statutes of limitations,[53]

51. *See, e.g.*, Knowles v. Gilchrist Co., 362 Mass. 642, 644-45, 289 N.E.2d 879, 881 (1972) ("[Courts] created a rule predicated on the art of pleading and . . . allocation of the burden of proof depended on the relative skills of the attorneys for the parties in drafting the pleadings."); R. BROWN, *supra* note 6, § 11.8 at 292 ("It is unfortunate to let the ultimate rights of the parties depend on mere questions of pleading and practice"). *See* Low v. Park Price Motors, 95 Idaho 91, 503 P.2d 291 (1972).

52. Section 400.7-403(1), RSMo 1969 provides in part that "[t]he bailee must deliver the goods . . . unless and to the extent *that the bailee establishes* . . . . damage to or delay, loss, or destruction of the goods for which the bailee is not liable . . . ." (emphasis added). Missouri did not enact an optional phrase at the end of § 400.7-403(1) (b) which would have had the effect of placing the burden of proofon the bailor. *See* comments to the statute, V.A.M.S. § 400.7-403 (Vernon 1969). Despite the early tendency of Missouri courts to construe all bailment actions as tort actions, an exception to this tendency was recognized under the Uniform Warehouse Receipts Act, which placed the burden of proving due care on the bailee. *See* Brown v. Sloan's Moving & Storage Co., 296 S.W.2d 20, 22, 23 (Mo. 1956) ("[R]egardless of the technical form of the action (whether in the nature of assumpsit, trover, or case) and regardless of however the issue of a warehouseman's negligence is raised, [provisions of the Uniform Warehouse Receipts Act] impose upon the warehouseman-defendant the burden of ultimately establishing that a loss, although by fire, was not due to defendant's negligence . . . . [A]lthough the plaintiff's claim arises out of a contractual relationship and plaintiff may declare as if upon the contract, the gist of plaintiff's action is negligence, and the burden of proof on the issue—negligence—is on the shoulder of the warehouseman-defendant to disprove his negligence because the Act puts it there.").

53. Section 516.120, RSMo 1969 allows five years to bring actions upon contracts and actions for taking or injuring goods or chattels. However, different jurisdictions